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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

In re J. H. et al., Persons Coming Under the
Juvenile Court Law.

2d Juv. No. B210037
(Super. Ct. No. JV44815)
(San Luis Obispo County)

SAN LUIS OBISPO COUNTY
DEPARTMENT OF SOCIAL SERVICES,

Plaintiff and Respondent,

v.

R. H.,

Defendant and Appellant.

Appellant R. H. (mother) appeals from a judgment of the juvenile court terminating parental rights to her twin sons (T-1 and T-2, or the twins) and establishing adoption as their permanent plan. (Welf. & Inst. Code, § 366.26.)¹ In a prior appeal (*In re R. H.* (Apr. 30, 2008, B205619), pursuant to the stipulation of the parties, we conditionally reversed the juvenile court's order of January 23, 2008, terminating parental rights due to a failure to adequately inquire about Indian ancestry pursuant to the Indian Child Welfare Act (ICWA). We also

¹ All statutory references are to the Welfare and Institutions Code.

directed the juvenile court to reinstate the order terminating parental rights if no tribe found that the children fell within the meaning of ICWA within 60 days of notice. Following remand, the juvenile court terminated mother's parental rights. Mother argues that the juvenile court erred by finding compliance with ICWA requirements despite the failure of the department of social services (DSS) to provide the tribes with adequate information, and by reinstating the order terminating parental rights before allowing the tribes the requisite 60 days to respond. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

The twins were born prematurely on May 8, 2006. On May 31, 2006, DSS filed a juvenile dependency petition (§ 300). The petition alleged, inter alia, that mother suffered from mild mental retardation and bipolar disorder; mother left a hospital against medical advice during pre-term labor; mother's "significant other" was a registered sex offender who reportedly abused drugs and suffered from five disabling mental disorders; and little information regarding the alleged father was available.

On June 1, the court held a detention hearing. Mother indicated that she had Cherokee Indian ancestry. She later completed a JV-35 form (Parental Notification of Indian Status) and indicated that the twins' maternal grandparents were Cherokee. The JV-35 omitted key facts regarding the maternal grandparents, including the years and places of their births. The twins' father did not attend the detention hearing or claim Indian ancestry. The parties submitted to detention and the court set a jurisdictional hearing for June 14, 2006.

The social worker's June 14, 2006, jurisdiction report indicated that T-1 had been placed in a confidential foster home and T-2 remained in a neonatal intensive care unit. Mother's social worker reported that mother might be capable of caring for the twins. In June 2006, mother did not live with the twins' father. She lived with a convicted child abuser who was required to register as a sex

offender. Mother became belligerent when she was advised that he could not be involved with the twins. She later forced him to move from her home.

On July 1, 2006, the juvenile court found true the allegations of the petition, declared that the twins were dependents of the juvenile court, and placed them in the custody of DSS for placement in foster homes. It also ordered that family reunification services be provided to mother.

On November 6, 2006, mother filed a section 388 petition seeking to set aside the court order placing the twins in foster care and requesting their placement in her care or the care of their maternal grandmother.

When mother was a minor, she was removed from grandmother's care and could not be reunified with her. Although grandmother invested considerable time and money redecorating and equipping a bedroom in her residence for the twins, her relationship with mother remained difficult. For example, in late 2006, grandmother slapped mother after mother called her a bitch. Grandmother later advised the social worker that her response was appropriate.

On November 13, 2006, the foster parents filed a request for de facto parent status. They had cared for the twins continuously after they left the hospital. (T-1 moved into their home on May 26, 2006. T-2 moved into their home later, on August 26, 2006, as he needed extensive treatment, including open heart surgery.)

On February 6 and 7, 2007, the juvenile court conducted six-month review proceedings. Mother had participated in an intensive 30-day parenting program designed for her but failed to gain the necessary skills to care for the twins. The juvenile court found that DSS had complied with the ICWA notice. It also considered and denied mother's section 388 petition; continued reunification services; and granted the foster parents' request for de facto parent status.

On July 18, 2007, the juvenile court held a 12-month review hearing and found that mother had not made substantial progress toward reunification. It terminated reunification services.

On January 23, 2008, the juvenile court conducted a section 366.26 hearing. It terminated mother's parental rights to the twins, concluded that they were likely to be adopted, and set a six-month post-permanency review hearing for July 21, 2008.

On April 25, 2008, grandmother sent an email message to the DSS social worker requesting reimbursement for certain expenses she incurred on behalf of the twins. Her email message ended as follows: "AND THE INDIAN CRAP [I AM] NOT GIVING IT TO YOU."

On April 30, 2008, pursuant to a stipulation of the parties, this court reversed the order terminating mother's parental rights because DSS had failed to adequately inquire about Indian ancestry pursuant to ICWA. We also directed the juvenile court to reinstate the order terminating parental rights if no tribe found that the twins fell within the meaning of ICWA within 60 days of notice.

In May 2008, the DSS social worker assigned to appellant's case made repeated attempts to obtain further information regarding the twins' claimed Indian ancestry. She telephoned grandmother on May 7, and left a message explaining that DSS needed to obtain additional information about her Indian ancestry and asked her to return the call at her earliest convenience. On May 8, mother telephoned the social worker and left a message asking her to "stop calling her mom [grandmother] and bugging her." On May 14, the social worker contacted mother to request any family information that she might be able to provide. Mother stated that she did not have any additional information. The social worker then asked mother if there were any other family members that DSS could contact (such as aunts, uncles, etc.). Mother stated that she did not know of any but that she would check into it and call back.

On May 30, the social worker again called mother to ask whether she had any additional family information or the names and telephone numbers of family members who would have information regarding family Indian ancestry or heritage. Mother stated that she did not know of anyone who would have the

information. The social worker then asked mother if she could provide the date of birth, and the city and state of birth of her mother and/or father (the twins 'maternal grandparents). Mother responded that she did not know any of this information but could try and speak with her mother to get the necessary information.

On June 10, 2008, the court scheduled a July 21, 2008, hearing (re "Review ICWA Notices for Accuracy"). DSS obtained some additional information regarding grandmother from its database.

On June 26, 2008, DSS sent a form ICWA-030 (Notice of Child Custody Proceeding for Indian Child) to the Bureau of Indian Affairs (BIA) in Sacramento; California; to the Secretary of the Interior in Washington, D.C.; to the Cherokee Nation of Oklahoma, in Tahlequah, Oklahoma; to the United Keetoowah Band of Cherokee Indians in Tahlequah, Oklahoma; and to the Eastern Band of Cherokee Indians, in Cherokee, North Carolina. The ICWA-030 described the hearing as a "Special/Interim: Regarding ICWA REVIEW," with a date and time of July 15, 2008, 1:00 p.m." The notices were received on June 30, 2008, by the BIA in Sacramento, by the United Keetoowah Band of Cherokee Indians and by the Cherokee Nation of Oklahoma; on July 1, 2008, by the Eastern Band of Cherokee Indians; and on July 2, 2008, by the Secretary of the Interior.

On July 21, 2008, the juvenile court conducted a post-permanency hearing. Counsel for DSS advised the court that "there was a response back from the Cherokee Nation that indicated that . . . the children can't be traced through their tribal records." That tribe's response was filed with the court on July 15, 2008. DSS counsel also asked "that the court accept the ICWA 030 form that was filed as an offer of proof on the ICWA issues." When the court responded, "I don't see [f]ormal ICWA orders," counsel "ask[ed] that the court file those tomorrow and that the court sign them . . . as to the offer of proof that we're offering today that the ICWA is not applicable . . . [¶] . . . [and that] the court find that the prior termination of parental rights be affirmed" The court responded, "So

Ordered." On July 21 or 22, 2008, the court signed findings and orders that include the following handwritten statement: "ICWA NOT APPLICABLE: PRIOR TERM OF PARENTAL RIGHTS AFFIRMED."

The record contains another signed document with findings and orders with a July 26, 2008, filing stamp. It states, "Created: 7/21/2008" and bears the signature of the court next to a date that appears to read "8-26-08."

DISCUSSION

Appellant argues that the juvenile court erred by finding the ICWA inapplicable to the twins before allowing the tribes the requisite 60 days to respond. We agree. DSS argues that appellant waived her right to raise this issue on appeal. This argument is not persuasive in view of the record before this court. Absent a determination by a tribe or the BIA, section 224.3, subdivision (e)(3) provides that tribes be provided adequate notice (60 days).

The juvenile court determined that ICWA did not apply on July 21 or 22, 2008. Conceding that "sixty days would not have elapsed until September 1, 2008," DSS correctly acknowledges in its brief that this court might "find it was premature for the juvenile court to make a determination as to whether or not ICWA was applicable on July 22, 2008." We do so find.

We also reject the attempt of DSS to argue that in this case it was necessary to expedite the determination regarding ICWA's applicability. (§ 224.2, subd. (d) [no proceeding shall be held until at least 10 days after receipt of notice by the tribe, or the BIA].) The record lacks any suggestion of an urgent need to make the determination before September 1, 2008, in this particular case.

DSS argues that the 60-day notice requirement pertains to situations where the tribes have not responded. This argument mistakenly assumes that a court can predict in advance whether the tribes will respond. Moreover, as DSS concedes, this court's April 30, 2008, order directed the juvenile court to reinstate the order terminating parental rights "if no tribe [found] that the child[ren] fell within the meaning of ICWA within 60 days of notice"

Generally, defective notice is prejudicial and requires reversal. (*In re Nikki R.* (2003) 106 Cal.App.4th 844, 850.) Because the right to notice belongs to the Indian tribes, a parent can raise the defect on appeal notwithstanding his or her failure to raise it below. "[I]t would be contrary to the terms of the [ICWA] to conclude . . . that parental inaction could excuse the failure of the juvenile court to ensure that notice under the [ICWA] was provided to the Indian tribe named in the proceeding." (*In re Marinna J.* (2001) 90 Cal.App.4th 731, 739.) However, we find no prejudice from the court's premature ICWA determination in this case. After appellant raised the error in her brief, DSS moved to augment the record with several documents, including two responses to the ICWA notice. We granted their motion. The record reflects that all three Cherokee tribes received actual notice and responded that the twins had no Indian ancestry.

Appellant also contends that the juvenile court erred by failing to ensure that adequate information was provided. In essence, she claims that there was no substantial evidence to show that the duty of inquiry was satisfied. We disagree. We review factual findings in the light most favorable to the trial court's order. (*In re Rebecca R.* (2006) 143 Cal.App.4th 1426, 1430.)

The twins' maternal grandparents reportedly had Indian ancestry. The DSS social worker made repeated attempts to gather additional information from mother and grandmother to provide to the tribes and BIA. Those attempts proved to be futile. The social worker also gathered whatever information she could from other sources to try to obtain adequate information. While the notice lacked adequate information, mother has not shown how DSS shirked any of its obligations to inquire. To the contrary, there is substantial evidence that DSS fulfilled its duty of inquiry after April 30, 2008, when this court reversed the prior order terminating appellant's parental rights. (*In re Rebecca R.*, *supra*, 143 Cal.App.4th at p. 1430.)

The judgment is affirmed.
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COFFEE, J.

We concur:

GILBERT, P.J.

YEGAN, J.

Honorable Roger Picquet, Judge
Superior Court County of San Luis Obispo

Catherine C. Czar, under appointment by the Court of Appeal, for
appellant.

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